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Supreme Court of the United States

OCTOBER TERM, 1962

No. 322

ALEXANDER T. SPERRY, *Petitioner*,

v.

STATE OF FLORIDA, ex rel., THE FLORIDA BAR,
Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF STATE BAR ASSOCIATIONS AS AMICI CURIAE

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ARKANSAS BAR ASSOCIATION
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I

THE INTEREST OF STATE BAR ASSOCIATIONS AS AMICI CURIAE

Members of the undersigned state bar associations have been active in meeting their obligation as officers of the various state and federal courts in this country in aiding those courts in their duty to regulate, control and define the practice of law in the interest of the sound administration of justice and in the interest of the public.

Regrettably but unavoidably there has been insufficient time to be in conference with all of the state bars in order to obtain their participation in this Brief. The absence of some state bars from participation in this Brief is to be attributed to such insufficiency of time rather than to any lack of interest or a suggestion of disagreement among the bars of the various states.

II

THE JUDICIAL SYSTEM

It would be presumptuous of us to consider in detail the history and origin of our system of law as it exists today. It is common ground that our system of law evolved from an empirical and subjective application of an individual will under a feudal system wherein the "King's foot" constituted the sole measure to be applied in the administration of justice. The volume of this primitive adjudicative work and the complexity of life even at an early time compelled the conclusion that the King should appoint royal justices in his place and stead. This brought about the beginning of the use of case precedent, statutes came into being and the early treatises of Glanvil, Bracton and others stated principles of judicial process and rules of law, as a result of which we evolved into an organized system to administer justice.

In 1292, it was considered advisable to establish an organized bar. It is noteworthy that the organization of the bar was from the earliest time under the direct control of the courts.

It is undoubted today that an independent legal profession is a necessary concomitant of an independent judicial system.

III

THE AMERICAN JUDICIAL SYSTEM

The legal system and the professional bar which is its necessary auxiliary, suffered setbacks in its transplantation to this country from England. In Colonial times, an era of untrammeled individuality was thrust upon the early inhabitants. Judges were not only laymen in all courts, but in many instances, were thought preferable to lawyers. This was due not only to the lack of sufficient numbers of legally trained people, but also to the primitive nature of the body politic in an era when every man did all things for himself. The inadequacies of lay persons attempting to operate the machinery of justice as a complex mechanism for the adjudication of human and property rights was soon manifested.

At the time the United States Constitution was being considered, the leading citizens of the colonies were in large part lawyers. The underlying philosophy enunciated in our Constitution was twofold. It provided first for a Federal system with some powers of government residing in the States and the other powers in the National government. Secondly, it provided for a separation of the powers of government into the three elements with which we are all familiar. This same general approach has been adopted by the states.

Under Article III, the judicial power was conferred upon the Supreme Court of the United States. In order to determine the nature and extent of the judicial power, it is necessary to have recourse to the Common Law wherein we find that it encompasses, among other duties and powers, control over the admission to the practice of law and discipline thereafter and the regu-

lation, definition and control of the practice of law. A necessary corollary of the power to admit is the power to exclude those not meeting judicial standards of fitness.

The Industrial Revolution had a tremendous impact on our social, economic and political life, and brought with it the realization of the fact, of greater and greater complexity, requiring ever again a more sophisticated system of law to cope with the ever new problems.

Among the many methods used to cope with such greatly increased complexities was the creation of the administrative agency which was unknown in the early day of the Common Law. The confusion concerning the exact nature of an administrative agency as an element of government is obviously still with us even today. It was early manifested that the untrammeled right to make findings of fact and conclusions of law within an administrative agency was unsatisfactory unless ultimate recourse to the judiciary was available. As a result, the systems evolved within administrative agencies, upon compulsion by the courts, became consistent with our basic theories of judicial process as implemented within the pure judicial structure.

It admits of no argument today to say that much of the power of administrative agencies is quasi-judicial in nature. It is quasi-judicial, and is stated to be such, only because they exist in a separate form somewhat different from the structure of a court.

IV

THE ADMINISTRATION OF JUSTICE TODAY

Local and state bar groups have learned from actual experience that, aside from the field of criminal law, there is no field of legal activity which some lay person or business entity does not wish to invade. In some cases the motivation lies in the fees directly charged by laymen for legal services. In others, the legal services are purportedly performed gratuitously as a type of "loss leader" to attract related profitable commercial transactions.

The lay practitioner invariably urges that he has acquired a special competency in his narrow field which gives his activity a flavor of public interest. His ability to solicit and advertise and his freedom from regulation and discipline give him the means of clothing his pretense with verisimilitude. However, his lack of responsibility to the judiciary, his freedom from professional responsibility for justice in its broad application and the narrowness of his technical training combine to make his pretense just that.

Just as the fate of society rests with the courts, so it does with the bar. No unauthorized practitioner champions unpopular causes; not even, in fact, unprofitable ones. The free or underpaid service every lawyer is familiar with is a stranger to the unauthorized practitioner. The organizations of lawyers participating in this Brief firmly believe that our courts have no more grave responsibility today than the preservation of a strong and independent bar from the usurpation of judicial power by the unauthorized practitioner. The fate of the bar will be the fate of the courts. The counsel for Respondent in this Case ap-

pears as an officer of our judicial system, pleading not a private cause, but the cause of this Court and of our society.

Within our Federal system judicial power exists within the States as well as within the National government. There is no authority for the proposition that judicial power as it relates to the control of the practice of law resides in either the Legislative or Executive branches of either State or National governments. It is notable that, although no advocates are heard to say today that judicial power does exist within the Legislative or Executive branches of government, they proceed to the non sequitur of claiming incidents of such judicial power at both the state and national levels.

The state bars have taken the lead in the protection of the public against those who would pervert an honorable profession into a commercial business. A listing of all cases on the unauthorized practice of law would show that the overwhelmingly greater number of unauthorized practice cases have been decided by state courts.

It would not be tenable to contend that the Federal judiciary under its constitutionally imposed judicial powers does not have a similar right and authority to curb the unauthorized practice of law when it finds it within its judisdiction. However, it is readily apparent that the power to control and regulate the practice of law resides in the Federal judiciary, rather than the Legislative branch of the National government.

In the instant Case, the State of Florida has acted under its police powers to protect the public in a most complex area of law. No Congressional power exists

upon which Florida has, or even could have, encroached in rendering the judgment here contested.

It is to be noted that the statute enabling the Patent Office to make rules of practice does not even purport to encroach upon judicial power nor to authorize the doing of any act which would constitute such a usurpation. It does not authorize the Patent Office to license Mr. Sperry to practice law relating to patents, and the rules of the Patent Office can rise no higher than the authorization of the statute. It is interesting also that Petitioner is compelled to contend for such an extreme position in order to attempt to make this a state's rights case. It is evident upon close analysis that the major premise upon which the petitioner proceeds is fallacious.

In the past, the Federal judicial system has basically relied upon state control over the practice of law and has not duplicated the administrative machinery necessary to supervise legal education, examine applicants for character, administer bar examinations and maintain disciplinary machinery.

There can be no doubt that the powers of the Federal judiciary do extend to such fields, should it care to exercise them. There has, however, been an effective accommodation of co-existent authority over the practice of law which has been harmoniously administered in the past. There is no reason to doubt that this can and will be the future course of the Federal and State judiciaries and of the organized bar.

A profession has been defined as consisting of three elements: organization, learned art and a spirit of public service. That the organization of the bar always has been an element of the judicial system and

is administered under judicial power is manifest. The position for which Petitioner contends has the net effect of creating a chaotic situation in the bar of the several states and before the Federal judiciary by destroying the very organization of the bar as it relates to many complex areas of law. The harmonious relationship which has existed to date between Federal and State judiciaries could be swept up on a tide of confusion if this position is accepted.

We do not wish to be understood to say that all acts and services performed today before administrative agencies do constitute the practice of law. It is for the courts to determine whether the nature of the services, each considered individually, do in fact constitute the practice of law, and to prohibit their performance by those persons not admitted to the practice of law. Undoubtedly, there are many administrative and ministerial functions which a lay person might perform for others within administrative agencies. Their definition is not before this Court in this case.

V

CONCLUSION

Law is the foundation of social order. If law is to be meaningful, it necessarily comprehends a system for its administration. The need in our social structure for a sound judicial system is identical with the need for a sound, responsible bar. The need for the one increases with the need for the other, and as a result of the same forces. Every increase in the complexity of our social and economic structure increases our individual and group reliance on our judicial system. The

courts could not, if they wished, discharge this responsibility alone. The courts must and will require of their bars that they sustain their full share of this obligation. Courts, which bear the primary responsibility for the functioning of our judicial system, must discharge this responsibility in part by calling upon the bar to meet its challenge, and in another part by protecting the integrity of the entire judicial system from outside destruction.

History tells us that if we are to maintain the freedom of individual action, an expression which has been the hallmark of our society and to which this Court has firmly dedicated so much of its concern, we shall need a continuing strengthening of our judicial system within all of its components.

We respectfully submit that when the nature of the services, which were considered in the decision by the Supreme Court of Florida, are analyzed, it is manifest that the decision is right. In those areas where Federal power exists over the practice of law, this power resides in the judiciary, not in Congress, and it must exist coextensively with the police power of the States.

The decision below does not become wrong because it was rendered by a state court rather than a federal court.

Respectfully submitted,

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